Supreme Court, U.S.
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No. 96-1219

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

MICHIGAN DOCUMENT SERVICES, INC.,
AND JAMES M. SMITH,

Petitioners,

v.

PRINCETON UNIVERSITY PRESS, MACMILLAN,
INC., AND ST. MARTIN'S PRESS, INC.,

Respondents.

BRIEF OF AMICI CURIAE CONCERNED LAW PROFESSORS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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STATUTES:

17 U.S.C. § 107 3

INTEREST OF THE *AMICI CURIAE*

The interest of the *amici* concerned law professors arises both from their status as teachers who regularly use course packs in their classroom teaching activities and from their status as scholars of intellectual property law who are interested in the resolution of this important copyright issue. Counsel for both petitioners and respondents have consented to the filing of this brief.

The concerned professors hope that this brief will assist the Court to understand the widespread problem created by the uncertain status of the law on this question and its adverse effect on the freedom of academic discourse in college and university classrooms throughout the nation.

Amici are professors at leading law schools around the nation who teach and write about copyright, intellectual property, and technology-related issues. Like teachers in countless other fields, *amici* frequently use individually tailored course packs (comprised of short excerpts from books, magazines, journals, and other works), especially in rapidly developing areas such as cyberspace law. Most legal textbooks cannot possibly provide the necessary breadth and depth of material on emerging issues in their fields, and texts that attempt to do so become outdated almost as quickly as they are published. To keep their courses current, *amici* must constantly gather photocopied excerpts from recent books, articles, and news accounts or risk depriving their students of important information on legal and non-legal developments of significance. Updating their materials on a semester-by-semester basis has become an academic and professional imperative.

As scholars of intellectual property, moreover, *amici* are interested in the application of copyright law to the widespread practice in higher education of creating individualized course packs for use by students in their classes. *Amici* believe that a uniform, nationwide answer is sorely needed on the question of whether the reproduction, for classroom use, of copyrighted materials in coursepack form, constitutes a fair use of these materials that should free them from royalty payments.

Only a uniform national answer -- one way or the other -- can end the acute uncertainty that currently inhibits the academic world, freeing teachers and scholars to choose academic materials for their students with a clear knowledge of their legal obligations. The current uncertainty threatens to constrain full and open exchange of ideas between teachers and their students.

ARGUMENT

In past generations, course materials in every discipline were provided to students either in copyrighted textbooks or in single volumes, including anthologies, which tended to remain topical for years. Recently, however, four phenomena have combined to transform college and professional teaching: (1) the explosion of scholarly writing on various subjects and of high-quality, informative journalistic articles about specialized subjects; (2) the accelerating pace of intellectual and technological developments, sometimes rendering the most thoughtful contemporary writing obsolete overnight; (3) the lack of published textbooks in many newer subject areas; and (4) the Internet and the World Wide Web, which have put hundreds of thousands of items from libraries and

laboratories, journals and newspapers around the world within reach of every teacher's computer terminal.

Teachers and scholars want to expose students to discoveries in their fields by integrating short excerpts from contemporary works into their reading. The device seized upon by thousands of conscientious teachers to accomplish that goal has been the creation of individualized course packs. Presently, however, teachers face basic legal uncertainty over whether or not the fair use doctrine, 17 U.S.C. § 107 (1994), protects this activity, or whether they must obtain publishers' clearances and pay any applicable royalties before adding such excerpts to their course packs.

If this Court grants certiorari and declares that non-profit course packs are a fair use, its holding would strongly encourage the free exchange of information among teachers and students. If this Court were to declare that course packs do not constitute a fair use, its holding would at least clarify teachers' legal obligations. What is presently lacking, is any authoritative guidance at all.

In *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1526 (S.D.N.Y. 1991), one federal district court opted for a narrow view of fair use, by holding that reproduction of course packs even at the request of faculty members in a nonprofit educational institution was not fair use. American publishers have aggressively employed the *Basic Books* decision to threaten legal action against faculty members and their supporting institutions nationwide, and have successfully compelled thousands of scholars and academic institutions to pay royalties or forego use of relevant excerpts in coursepacks. Now, in *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381 (6th Cir. 1996), the Sixth Circuit has spoken en

banc, rejecting a panel decision that had held coursepacks to be a fair use.

Amici strongly urge the Court to issue a writ of certiorari in this case and to clarify this matter. As publishers are well aware, very few faculty members can afford professional liability insurance. Faculty salaries are typically a meager reward for years of professional training. Colleges, universities, and other supporting institutions that house most scholars are normally non-profit entities, often economically strained and ill-equipped for sophisticated and protracted copyright litigation against national publishing corporations. It is far less risky for teachers, scholars and the institutions that support them to acquiesce in the face of threats from copyright holders.

Ironically, in the view of *amici*, the predominant response to such pressure by publishers will not likely be a substantial flow of new royalty payments to publishers. Instead, many teachers will reluctantly choose to forego the time-consuming and financially uncompensated effort of compiling the newest materials for their students. The *Basic Books* and *Michigan Document Services* decisions, in other words, are likely to restrict course content across the nation, inhibit scholarly initiative, and freeze much classroom intellectual inquiry. No lower court decision should be allowed to inhibit the freedom of academic expression throughout the United States so seriously without prompt review by this Court.

Amici believe the issue of whether reproduction of portions of copyrighted works in coursepacks is a fair use is of national importance in public and private education, affecting millions of teachers and students in high schools,

colleges, graduate and professional schools in every state in the Union.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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